

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X	:	
THE BASU GROUP INC.,	:	
	:	
Plaintiff,	:	Civil Action No.
	:	16-cv-00461-PGG
v.	:	
	:	
SEVENTH AVENUE, INC.	:	<b><u>JURY DEMANDED</u></b>
	:	
Defendant.	:	
-----X	:	

**SEVENTH AVENUE, INC.'S AMENDED STATEMENT OF FACTS**  
**PURSUANT TO RULE 56 (c) F.R.C.P. AND LOCAL CIVIL RULE 56.1**

Defendant Seventh Avenue, Inc. (hereinafter SEVENTH AVENUE) through its counsel hereby submits as its Statement of Facts, Pursuant to Fed. R. Civ. P. 56 and Local Rule 56.1, the following:

**THE PARTIES AND SUBJECT MATTER AT ISSUE**

1. Plaintiff The Basu Group Inc. (hereinafter "Basu"), is a corporation of the state of New Jersey, with an office and place of business at 1003 Berkshire Drive, Princeton, NJ 08540. Complaint Doc. 1 ¶ 4. Def Cumul Appx 1419
2. Seventh Avenue, Inc. (hereinafter "SA" or "Defendant"), is a corporation of the state of Wisconsin having a place of business at 1112 7<sup>th</sup> Avenue, Monroe, Wisconsin 53566. Complaint Doc. 1 ¶ 7. Def Cumul Appx 1420
3. Defendant is the owner and operator of the retail, internet website located at [www.seventhavenue.com](http://www.seventhavenue.com) which distributes a consumer goods catalog nationwide. Complaint Doc. 1 ¶ 7. Def Cumul Appx 1420
4. Defendant regularly offers for sale and sells through its website and catalogs consumer goods to consumers located throughout the United States. Complaint Doc. 1 ¶ 8. Def Cumul Appx 1420
5. Basu has record title to a Copyright registration in a certain work of art entitled "Peacock Feather #1." Basu Deposition ("Dep.") Page 36, line 20 to page 37 line

6. Basu has used said artwork to further create designs found on Basu’s goods (hereinafter the “Peacock Feather Design”). *Id.*

7. Defendant sold a product identified as “Hand-Painted Leather Peacock Bag #07724955.” Davis Dep. 19:8-9, 21:3-5; see Complaint Ex. B. Defendant’s Cumulative Appendix (“Def Cumul Appx”) 320 - 321

**BASU’S CREATION OF PEACOCK FEATHER #1**

8. In 2007 Mr. Basu attended trade shows to see what designs were becoming popular and concluded that “feathers” were becoming popular. Basu Dep. 47:14-25. Def Cumul Appx 59

9. At the time of Basu’s preparation of Peacock Feather #1, Basu had in its possession, preexisting images that Basu downloaded from the Internet and/or clipped from magazines. (“some came from the internet. There was a few that we found in a magazine cutting. So, yeah, I mean, typically we get all our images from publications, like magazines or the internet...what you're looking at in exhibit four are images that were either downloaded from the internet or cutouts from magazines and newspapers”). Basu Dep. 41:13-43:12, 52:17-20. Def Cumul Appx 51 - 53

10. One of the preexisting images bears a copyright notice, “Snakey’s Creation © 2004” which is someone other than Basu. Basu Dep. Ex. 4 TBG0001292; Counterclaim Ex. C Doc. 60-2, 3 Brezina Dec. Exh. B. Def Cumul Appx 136

11. At the time of preparation of Peacock Feather #1 the three co-authors had, displayed on a table, the preexisting photographs. (“All the photographs in exhibit four. Yeah, I mean, it was on the same table. We were all working together. So, you know, when we're working together, the photographs are -- you know, whatever material we gather, we have it available to everybody. So the three of us, when we were working, it's lying on the table. I'm sure everybody looked at it”). Basu Dep. 49:11-24. Def Cumul Appx 59

12. Basu used the preexisting images to define the look and feel of Peacock

Feather #1. Basu Dep. 45:5-46:14, 48:20-21, 144:16-17. Def Cumul Appx 55 – 56, 58, 103

13. The preexisting images were fixed in a tangible medium of expression, either as images on the Internet or as images printed in magazines. Basu Dep. 41:13-43:12, 52:17-20. Def Cumul Appx 51 – 53, 62,

14. The individual strands in some of the preexisting peacock feather images and Peacock Feather #1 are roughly the same thickness and width. Basu Dep. Ex. 4 TBG0001287-1291. Def Cumul Appx 132 - 139

15. The width of each feather strand in some of the preexisting peacock feather images and Peacock Feather #1 gradually taper off to a point at the tip of the feather. *Id.* Def Cumul Appx 132 - 139

16. The feather strands in some of the preexisting peacock feather images and Peacock Feather #1 feature colored inner lines with a black outer border. Basu Dep. Ex. 4 TBG0001288-89, 1291. Def Cumul Appx 133, 134, 136

17. Many of the colors used in the preexisting peacock feather images, the natural peacock feathers and Peacock Feather #1 are the same. Basu Dep. Ex. 4 TBG0001287-1291; Basu Dep Ex 5, TBG – 1623, see also Plaintiff's Ex. 50-51 TBG0001623-1624 (original feathers in possession of Plaintiff's counsel) Counterclaim Exh C, Doc 60 – 3, 2 – 3 Def Cumul Appx 132 – 139, 141, 324, 325

18. Some of the preexisting peacock feather images, the natural peacock feathers and Peacock Feather #1 have blue strands with a black border. Basu Dep. Ex. 4 TBG0001287-1291; Counterclaim Ex. C TBG0001623-1624, Doc. 60-3, 2-3. Def Cumul Appx 132 – 139, 141, 324, 325

19. Most of the preexisting peacock feather images, the natural peacock feathers and Peacock Feather #1 have an upside-down heart-shaped image in the center area of the feather. Basu Dep. Ex. 4 TBG0001287 - 1291; Basu Dep Ex 5, TBG – 1623, Counterclaim Ex. C TBG0001623-1624, Doc. 60-3, 2-3. Def Cumul Appx 132 – 139, 141, 324, 325

20. Most of the preexisting images, the natural peacock feathers and Peacock

Feather #1 have a heart-shaped image superimposed over an oval image of a contrasting color upside-down heart-shaped image in the center area of the feather. Basu Dep. Ex. 4 TBG0001287-1291; Basu Dep Ex 5, TBG – 1623, Counterclaim Ex. C TBG0001623-1624, Doc. 60-3, 2-3. Def Cumul Appx 132 – 139, 141, 324, 325

21. Most of the preexisting peacock feather images, the natural peacock feathers and Peacock Feather #1 have the heart shaped image and the oval image encircled by a roundish form, featuring yellow, green and purplish colors. Basu Dep. Ex. 4 TBG0001287-1291; Basu Dep Ex 5, TBG – 1623, Counterclaim Ex. C TBG0001623-1624, Doc. 60-3, 2-3. Def Cumul Appx 132 – 139, 141, 324, 325

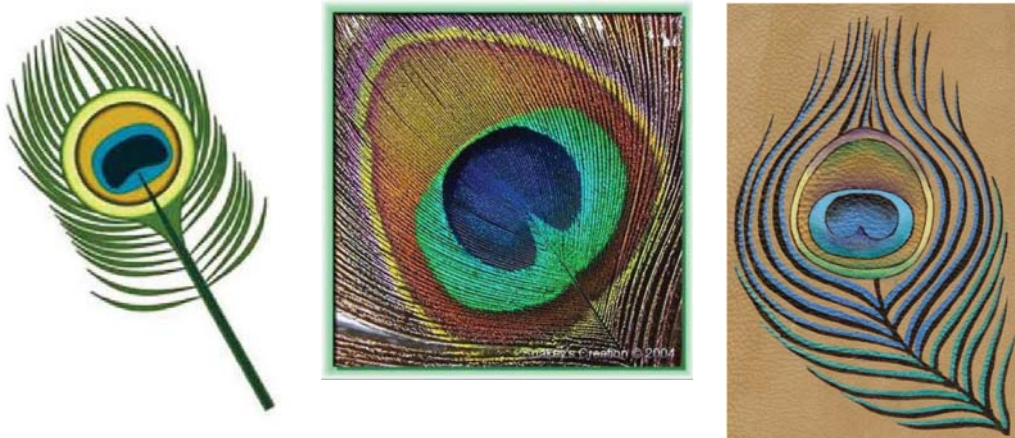
22. The image with the “Snakey’s Creation © 2004” copyright notice has purplish coloring. Basu Dep. Ex. 4 TBG0001291; Counterclaim Ex. B TBG0001291, Doc. 60-2, 7. Def Cumul Appx 136

23. Basu did not have permission from the authors of said images to prepare a work or works having those common elements. (“images that were either downloaded from the internet or cutouts from magazines and newspapers”) Basu Dep. 52:17-20. Def Cumul Appx 62

24. The image at the bottom right of the first page of images used by Basu as “Inspirations” appears to be a whimsical, rather than realistic, image representing a peacock feather. Basu Dep. Ex. 4 TBG0001287, Counterclaim Ex. B Doc. 60-2, 3. Def Cumul Appx 131

25. Two of the preexisting images are strikingly similar to Peacock Feather #1:

Basu Dep. Exh. 4,	Basu Dep. Exh, 4,	Plaintiff’s Ex. A
TBG0001287, Bottom	TBG0001291.	Doc. 1, 10, Peacock
Right Image, Rotated		Feather #1.



Def Cumul Appx 132, 136, 130

26. Basu had natural peacock feathers when preparing Peacock Feather #1 (“these were the feathers that we used back in 2007 when we were designing the peacock feather”). Basu Dep. 139:13-15; Basu Dep Ex 5, Counterclaim Ex. C Doc. 60-3, 2-3; Plaintiff’s Ex. 50-51 (originals in possession of Plaintiff’s Counsel). Def Cumul Appx 100, 139, 141, 324, 325

27. Peacock Feather #1 was also derived from natural peacock feathers.

Q. And the first sentence reads: With its iridescent plumage and dazzling beauty, the gorgeous peacock has been a muse for our designers for years. Do you see that?

A. Yes, I do.

Q. And then it continues: We combine the shimmering feathers with glowing tangerine lilies to add glamor to a classic art. What is the classic art referred to there?

A. Well, first of all, this is marketing verbiage. The classic art in this instance is being referred to as a peacock feather story that we created with flowers. So the peacock feather being a very key element of this specific artwork and over the years we have seen that customers come to us for our peacock feathers.

Q. What does has been a muse for our designers mean?

A. I guess the marketing team was trying to refer to our -- you know, our inspiration. You know, again, its marketing verbiage. So the consumer who is looking at this image reading this text it romanticizes the process of how we get inspired by elements of nature.

Q. So that would be the peacock inspiration in exhibit -- I think it was four that we were talking about? Is that the muse for the designers?

A. I've got to look. That's exhibit four; right?

MR. GILMAN: Yes.

Q. Is that the inspiration, the muse for your designers, exhibit four?

A. Well, as we have discussed earlier today that I am one of those authors, so yeah, I mean, those feathers have definitely been an inspiration to me...

MR. BREZINA: It speaks for itself, but with its iridescent plumage and dazzling beauty the gorgeous peacock has been a muse for our designers for years, period. We combined the shimmering feathers with a glowing -- I'm sorry, with glowing tangerine lilies to transform a classic art into a glamorous accessory. I think I may have missed the tangerine part.

MR. GILMAN: Thank you.

*Id.*; see also Basu Dep. Ex. 13; Basu Dep. 112:8-113:14. Def Cumul Appx 89, 90, 100, 141, 192, 324, 325, 13xx

28. The natural peacock feathers were used to create the look in Peacock Feather #1 which was then subsequently used to create products that were sold. ("I looked at images of peacock feathers and then we drew it several times until we got it to a shape and form that best represented the look that I wanted to create with the peacock feather and then use that look in the rest of my subsequent creations. Q. And that look that you ended up creating was from the picture of exhibit two? A. That is correct"). Basu Dep. 140:12-20. Def Cumul Appx 101

## **BASU'S PRODUCTION PROCESS AND PRODUCTS**

29. Peacock Feather #1 is an internal guide for use by the manufacturer of hand-painted handbags. ("I mean, again, the picture that you see, the color is -- like I said earlier as well is something -- for us it's like, you know, we can put different colors there to create a representation, because this, these colors by themselves are not a real feather, you know, as is. So in our view, in the world of drawing and coloring, you know, the drawing itself, as in the black lines, the way we have defined this peacock feather so that we can place colors along it, along the sides of those black lines or within the framework of those black lines is what allows us to create our art. So -- no, I mean, specifically this one has no red color, but we can use any color we want to") Basu Dep. 35:19-36:10; ("... use that as our guidelines to arrange, you know, different colors around them to create various images of peacock feathers") *Id.* at 42:22-25; ("Yes, that's the look we want to move forward with, and that became our initial guideline to how we wanted to do the feather") *Id.* at 58:21-24;

element or artwork, etc."). *Id.* at 134-135:5. Def Cumul Appx 48 – 49, 52, 68, 95 - 96

30. Basu's production process, to go from an unpublished, internal, design such as Peacock Feather #1 to a handbag, requires care to adapt the internal guide to the finished product with new artwork.

Q. What did you do when you used it to create different bags?

A. So when we are designing any artwork, when I'm sitting and thinking and planning what that artwork is going to look like, a bag, a handbag is not the same as a -- you know, a canvass literally. A canvass is rectangular in shape typically and you've got, you know, several inches on one side and a few inches on the other side. It's a flat surface. You can plan the artwork in a certain way. When you're planning artwork on a bag, you've got to think about a 360 degrees all around the bag representation of your story, and we're trying to create a story with our elements, of course. So for me to plan that art, what I do is first I create an element that I want to work with, and once I have my elements created, I place that along the bag and I try different combinations, different sizes to figure out what would look best. The leather might wrinkle in certain parts. The bag might fold in certain areas. The art might get hidden, etc. So I've got to be careful of all of those things when placing my artwork so that when the bag is being carried by a customer in its true form and the leather is in its natural form against that bag, the artwork still stands out. So what you're seeing in this -- in these images is us placing that artwork in a certain fashion so that the story comes across on the bag's surface the way we intended it to be represented.

Basu Dep. 53:14-54:19. Def Cumul Appx 63 - 64

31. Peacock Feather #1 was used as a guideline to prepare sample handbags which had their own new art derived therefrom, and then the sample handbags were copied to manufacture the final production versions for sale.

So during the creation process, it's a closely guarded secret, whatever new artwork we're creating. So it's a small team that is involved, and at the time of this peacock feather, it was Soumitra, my mother and myself. I was there in the room creating this artwork with them, and once the artwork was created and we were satisfied with what we created, we created samples of bags that we wanted to launch in the market, and once that bag goes into production, we then share that sample, the initial sample with our artisans and they go ahead and recreate that art on those bags. They color the bags just by looking at the samples. So that process, you know, like basically sometimes we are painting the bag before it is constructed. Sometimes we're painting the bag after it is constructed. The different aspects of this artwork that -- you know, that takes place before and after based on the construction because the leather is getting folded or pleated, you can't draw on that or do anything with that, or rather it gets very complicated if you try to do it after it is stitched and pleated. So there is before and after stages when we are applying the artworks and the colors and the painting to the bag and they -- again, when



they're working, they always have that sample in front of them, the original sample, and once all of those things are done, we inspect it and then we sign every bag.

Basu Dep. 55:1-56:5. Def Cumul Appx 64 – 66

32. The most important features in Peacock Feather #1 are the lines, not the colors, because the colors can be changed for painting on production handbags. Regarding the eye:

[I]n terms of colors, we've used everything from purple to yellow to blue to green. We've used metallic gold. We have used black. We've used different colors, but again, for us, when we were drawing it, the lines were the most important part to kind of how we interpreted the look of that eye, and the colors were more of a secondary thing, because we can keep changing those colors, we can -- because it is kind of using artistic liberty, we can have fun with using different colors to create different expressions of the same element. So the most important part of when we were drawing it were those four lines so that we could separate our coloring and create an effect that has a good impact.

Basu Dep. 33:1-12. Def Cumul Appx 46

33. Because Peacock Feather #1 was used as an internal guideline, it was not itself published, the published derivative works having differences.

Q. Let's refer back to exhibit two, the picture at the bottom. Exhibit two has the barbs or branches at the bottom with green and blue coloration; correct?

A. Yes.

Q. Black lines and on top –

A. There are green lines, yeah.

Q. And the picture you identified in page 141 has a reddish or pink at the bottom and then a greenish blue, the ones above it; correct?

A. Yes, it's a different coloration.

Q. And the curve of the quill or stem is different in exhibit two and in item number 1078; correct?

A. Well, yeah, it's slightly different. This is curving in one direction. That's curving in the other.

Q. And the coloration of the eye is different; correct?

A. Yes, it is different, and like I was telling you earlier, for me it was more about the drawing itself of the peacock feather that represented our creation and giving us the liberty to fill those gaps with any color we wanted to.

Basu Dep. 105:14-106:12. Def Cumul Appx 63 - 64

34. The production hand-painted handbags that have been sold by Basu all have peacock feather designs that vary from the deposit with the application to various degrees.

(“Q. All right. Your bags are all hand painted; correct? A. Yes, they are. Q. So there are



no two alike? A. There is always going to be little differences because when you're hand painting a bag, you're using brush and paint and you're applying that paint in different ways, and just like your own personal signature, no two bags can be exactly the same")  
Basu Dep. 36:20-37:4. Def Cumul Appx 49 - 50

### **BASU'S COPYRIGHT APPLICATION**

35. Mr. Basu has personally prepared and filed Copyright applications. Basu Dep. 71:18-25. Def Cumul Appx 69

36. Basu carefully reviewed facts surrounding authorship of Peacock Feather #1 prior to filing, including careful review of the authorship of the three named authors and identifying them, and the nature of their authorship in completing the application. Basu Dep. 84:19-88:10; Basu Dep. Ex. 9 94:6-95:1. Def Cumul Appx 75 – 79, 144 - 158

37. In completing the application Basu was prompted by the electronic Copyright Office application form to complete the screen-identifying limitations to the copyright claim if: the work contained was based on previously registered material, previously published material, material in the public domain or material not owned by Basu. Brezina Dec. Exh. A, pages SA001229 - SA001235; Counterclaim Ex. D. Doc. 60 – 4, pages Page 2 – 9 Def Cumul Appx 3 - 10

38. The application as filed did not identify any preexisting works, and specifically did not identify the 2D Artwork in Basu Dep. Exh. 4. Brezina Dec. Exh. A, pages SA001229 – SA – 001231; Basu Dep. 83:8-25; Counterclaim Ex. D Doc. 60-4; Answer to Counterclaim ¶ 14.

39. The application as filed identified the work as “published” and the date of publication as January 1, 2008. Brezina Dec. Exh. A, pages SA001229 – SA001231, see Basu Dep. 78:7-9; Counterclaim Exh. D, Doc. 60 -4. Def Cumul Appx 3 – 10, 71

40. Basu knowingly made false representations of material facts in its application for Copyright Registration No. VA 1-652-678.

A: January 1 is a national holiday in the U.S. Were you working that day? A. No. We were not -- like so we actually started distributing it even before that

and it is -- you know, on that date, people had already gained access through their e-mail boxes or other formats.

Basu Dep. 79:2-11. Def Cumul Appx 63 – 64, 72

41. Basu caused to be filed, on February 6, 2009 with the Register of Copyrights, an application to obtain a Certificate of Registration bearing the title “Peacock Feather #1” on February 6, 2008. Brezina Dec. Exh. A, pages SA001229 – SA001231; Counterclaim Ex. D, Doc. 60 – 4. Def Cumul Appx 3 - 10

42. The deposit sent to the Copyright Office was a photograph of hand-painted art on a piece of leather. Basu Dep. 36:11-19. Def Cumul Appx 128 - 130

43. Certificate of Registration VA 1-652-678 was issued by the US Copyright Office based on the information submitted in the application and the deposit; said Certificate, having an effective date of February 10, 2009.; Basu Dep. Exh. 2; Complaint Ex. A; Complaint ¶ 14; Counterclaim Exh. A See Compendium III 204.3(A),(B). Def Cumul Appx 128 - 130

44. Basu wants to use its Copyright to control use of its ideas. (“I obviously did not want that artwork to end up or my ideas to end up elsewhere”) Basu Dep. 86:24-87:1; (“I need to protect that idea of mine that I’m bringing to the table that I’m creating as a collection for our company and also, of course, from a legal standpoint for the purpose of being able to copyright that work and protect ourselves”) *Id.* at 87:13-18. Def Cumul Appx 77 - 78

#### **SEVENTH AVENUE’S ACCUSED WORK**

45. At one time Seventh Avenue sold a handbag called “Hand-Painted Leather Peacock Bag”, under Item No. #D7724955. Complaint, ¶ 17, Doc. 1,3 of 12; Amended Answer and Counterclaim¶ 17, Doc. 60, 5 of 20 ; Complaint Ex. B. Doc. 1, 12 of 12 Def Cumul Appx 1421, 1430, 1435

46. Seventh Avenue is a retailer that, for the vast majority of goods, and specifically for the hand-painted handbags at issue in this case, relies on suppliers and intermediary “agents” to suggest designs for products to be offered for sale by Seventh

Avenue and its sister companies, including Midnight Velvet, Inc. (“Midnight Velvet”) to their retail customers. Ludwig Dep. 9:18-10:9, 13:18-14:13, 15:3-4, 26:4-27:12. Def Cumul Appx 221 – 222, 225 – 226, 227, 234

47. Seventh Avenue and its sister company, Midnight Velvet, sell retail product to consumers through catalogs and websites. Ludwig Dep. 20:22-21:7. Def Cumul Appx 230

48. Seventh Avenue has not purchased goods from Basu, does not have any sample products from Basu, and has not discussed Basu, other than when preparing for deposition. Ludwig Dep. 23:6-19, 24:13-23. Def Cumul Appx 231`

49. Seventh Avenue’s employee in charge of identifying sources for handbags has not sent photographs of other companies’ products to potential suppliers. Ludwig Dep. 28:12-29:7. Def Cumul Appx 236

50. The agent who provided the design for the red peacock handbag to Seventh Avenue was Manju Mittal who does business as Anusha Marketing. Ludwig Dep. 30:5-24; Ludwig Exh. 9 SA000368, SA000377, 1,10; Ludwig Exh. 11 WSA000385; Ludwig Exh. 12 SA000396, SA0039913, 1, 4; Ludwig Exh. 13, SA000387, SA00393, 1, 7. Def Cumul Appx 238, 1407, 260, 261, 264, 266, 272

51. The manufacturer of the red peacock handbag is Shankar Produce Co, Pvt. (“Shankar”). Ludwig Dep. 30:2-4, 18-20, 31:1-4, 17-25, 31:1-6. Def Cumul Appx 238, 239

52. Communications about the graphic design that eventually became the design on the red peacock handbag began in 2012. Ludwig Dep. 35:5-13, 37:7-21, Ex. 11 SA000385, Ex. 12 SA00396, SA00399, 1, 4, Ex. 13 SA000387, SA00393, 1, 7. Def Cumul Appx 243 – 245, 260, 261, 264, 266, 272

53. The first time Seventh Avenue saw the graphics that became the red peacock handbag was in an electronic mail communication (“email”) from Manju Mittal to Paula Ludwig dated September 24, 2012 which contained an attached photograph designating the item “#3778” and “bearing the date “2012 08 10” being shown on page 4 of Plaintiff’s Exhibit 12. Ludwig Exh. 12 SA000396, SA000399, 1, 4. Def Cumul Appx 245 – 246, 261,

54. In an email Reply to Plaintiff's Exhibit 12, Seventh Avenue requested a product sample of item "#3778." Ludwig Dep. 38:24-39:3; Ludwig Exh. 13 SA000387, SA00393, 1, 7. Def Cumul Appx 246 – 247, 266, 272

55. Whether or not a date is shown on a copy of a document saved electronically may depend on the particular medium used for sending an email and the device on which a copy was stored. Ludwig Dep. 43:18-44:5, 46:1-5. Def Cumul Appx 248 – 249, 250

56. Seventh Avenue did not buy product with the red peacock feather design in 2012. Ludwig Dep. 42:18-20; Def Cumul Appx 247

57. In December, 2014, for inclusion in a Fall 2015 catalog, Seventh Avenue expressed to its purchasing agent interest in the 2012 red peacock feather design, to be painted on a different size bag. Ludwig Dep. 48:17-50:6; Ludwig Exh. 17 SA000425-SA00426; Ludwig Exh. 18 SA000427-SA00428; Ludwig Exh. 19 SA000429-SA00430. Def Cumul Appx 251 – 253, 275 - 279

58. After receiving pricing information and the identity of the factory for the red peacock handbag, Seventh Avenue began the process to obtain samples, photographs, product specifications and documentation including a detail sheet and quote sheet to put the red peacock handbag in the Fall 2015 Midnight Velvet catalog. Ludwig Dep. 49:18-52-25; Ludwig Exh. 20 SA000434-SA000450, SA000430-SA000433; Ludwig Exh. 21 SA000472, SA000475, 1, 4; Ludwig Exh. 22 SA000452-SA000456; Plaintiff's Ex. 20. Def Cumul Appx 252 – 255, 280 – 296, 301 – 304, 305 - 309

59. In sum, Manju Mittal sent Seventh Avenue design ideas in 2012 and 2013, one of which was the red peacock design, but on a different bag. Ludwig Dep. 52:16-22. Def Cumul Appx 255

60. Beginning in December, 2014, Seventh Avenue sought the existing red peacock design to be placed on a handbag. Ludwig Dep. 54:23-55:11; Ludwig Exh. 19 SA000429-SA000430. Def Cumul Appx 256 – 257, 279

61. The new handbag with the old design was larger. Ludwig Dep. 57:8-13. Def

Cumul Appx 259

62. Peacock Feather #1 of Basu has no red coloration. Basu Dep. 35:19-21. Def

Cumul Appx 48

63. On December 17, 2015, Shankar explained to Manju that it:

[W]ould like to confirm you that all the designs in Peacock feather is developed by us for our different buyers since 2008 Our team of artists make them as per requirement of our buyers (sic). We never copy anyone else's designs (sic). All our designs in hand painting as well as styles are developed exclusively for our buyers as per their demand and requirements. Peacock feather is the national bird of India and hence nobody can make it registered (sic). Peacock feather is also very well used in fabrics for making dresses.

Ludwig Exh. 25. Def Cumul Appx 310 - 312

64. Anurag Chokhany is Director at Shankar Produce Company Private Limited in India. Chokhany Dec. ¶¶ 1-3. Def Cumul Appx 15

65. Shankar produced and sold to Seventh Avenue, Inc. the Red Peacock Feather Bag. Chokhany Dec. ¶ 4 Ex. A. Def Cumul Appx 15, 19 - 20

66. All Shankar designs in hand painting, as well as styles, are developed for their buyers as per their demand and requirements. Chokhany Dec. ¶ 5. Def Cumul Appx 15

67. All the designs Shankar offers that include Peacock feathers have been developed by Shankar for their buyers since 2008. Chokhany Dec. ¶ 6. Def Cumul Appx 15

68. Shankar's team of artists make graphic designs for bags as per requirement of their buyers. Chokhany Dec. ¶ 7. Def Cumul Appx 15

69. In the year 2012, one of Shankar's Australian customers asked for a peacock design which became the design on the Hand-Painted Leather Peacock Book Bag. Chokhany Dec. ¶ 8 SA001239; Chokhany Dec. Ex. B SA001246. Def Cumul Appx 15 – 16, 21 - 22

70. The artist who created the Peacock Book Bag is named Sujit Das. Chokhany Dec. ¶ 9 SA001240. Def Cumul Appx 16

71. Shankar had a team of artists including Sujit Das that created the red peacock

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design in Shankar's factory on request of Shankar's Australian customer; with red being one  
of the main colors on the Peacock Book Bags. This occurred sometime in the year 2012.

Chokhany Dec. 10 SA001240. Def Cumul Appx 16

72. Mr. Das picked up an original feather and bought a fabric swatch from the  
market with peacock prints, and developed the initial design for the Peacock Book Bag.

Chokhany Dec. ¶ 12 SA001240. Def Cumul Appx 16

73. The Peacock Book Bag design was sent to the Australian customer.  
Chokhany Dec. ¶ 13 SA001240. Def Cumul Appx 16

74. The Australian customer made some comments, and the Peacock Book Bag  
design was then developed accordingly. *Id.*

75. The background abstract peacock portion of the Peacock Book Bag design  
was derived from fabric sold for dresses. Chokhany Dec. ¶ 14 SA001240. Def Cumul Appx  
16

76. The portion of the Peacock Book Bag design that most closely resembles a  
natural peacock feather was derived from a natural peacock feather. *Id.*

77. The suggestion from the Australian customer to change the Peacock Book  
Bag design was to include red as the dominant color for the background and eye of the  
peacock feather. Chokhany Dec. ¶ 16 SA001240 – SA001241. Def Cumul Appx 16

78. The Peacock Book Bag design having the original peacock feather, was used  
on the bag sold to Seventh Avenue with no suggested changes from Seventh Avenue to the  
Design, (besides using the Peacock Book Bag design on a different item). Chokhany Dec. ¶  
17 SA001241. Def Cumul Appx 16

79. Sanjit Das created the Peacock Book Bag and the Red Peacock Feather Bag  
from an original peacock feather, a fabric swatch with peacock prints and comments from  
the Australian customer - completely independently from Anushka items. Chokhany Dec. ¶  
18 SA001241. Def Cumul Appx 16 – 17

80. The design on the Peacock Book Bag as Exhibit B (SA000393) was used for

Cumul Appx 16 – 17, 20 - 21.

81. The Peacock design was hand painted on each Red Peacock Feather Bag. Chokhany Dec. ¶ 198 SA001241. Def Cumul Appx 17

82. Shankar never copies anyone else's designs. Chokhany Dec. ¶ 20 SA001241. Def Cumul Appx 17

83. Seventh Avenue and its affiliates did not provide any creative input used in creating either Peacock design. Chokhany Dec. ¶ 21 SA001241. Def Cumul Appx 17

84. Seventh Avenue's "Hand-Painted Leather Peacock Bag", Item No. #D7724955 has much of the surface area on each face panel, and all of the end and bottom panels, bearing a red color. Chokhany Dec. Exh. A SA001239; Complaint Ex. B Doc 1, 12. Def Cumul Appx 19 – 20, 1430

85. Seventh Avenue's "Hand-Painted Leather Peacock Bag", Item No. #D7724955, on each face panel has all, or a portion, of approximately ten abstract, teardrop shapes, colored primarily in: white, blue and red. Chokhany Dec. Ex. A SA001239; Complaint Ex. B Doc. 1, 12. Def Cumul Appx 19 – 20, 1430

86. About half of the white, blue and red teardrop shapes on Seventh Avenue's "Hand-Painted Leather Peacock Bag", Item #D7724955, have within them, single or concentric oval shapes of contrasting red, or red and gold colors. *Id.*

87. Two or three of the white, blue and red teardrop shapes on Seventh Avenue's "Hand-Painted Leather Peacock Bag", Item #D7724955 have most, or part of, a stylized peacock feather design superimposed on blue or red teardrop shapes. *Id.*

88. The individual strands some of the preexisting peacock feather images and Seventh Avenue's "Hand-Painted Leather Peacock Bag", Item #D7724955, are roughly the same thickness and width. Basu Dep. Exh. 4 TBG0001287-1291; Counterclaim Exh. C, Doc. 60 – 3, pages 2 - 3, TBG0001623-1624; Chokhany Dec. Ex. A SA001239, Complaint, Exh. B, Doc. 1 page 12. Def Cumul Appx 19 – 20, 132 – 139, 1430



89. The width of each feather strand in some of the preexisting peacock feather images and Seventh Avenue's "Hand-Painted Leather Peacock Bag", Item No. #D7724955 gradually taper off to a point at the tip of the feather. *Id.*

90. The feather strands in some of the preexisting peacock feather images and Seventh Avenue's "Hand-Painted Leather Peacock Bag", Item No. #D7724955 feature colored inner lines with a black outer border. *Id.*

91. Many of the colors used in the preexisting peacock feather images and Seventh Avenue's "Hand-Painted Leather Peacock Bag", Item #D7724955 are the same. *Id.*

92. Some of the preexisting peacock feather images and Seventh Avenue's "Hand-Painted Leather Peacock Bag", Item #D7724955 have blue strands with a black border. *Id.*

93. Some of the preexisting peacock feather images and Seventh Avenue's "Hand-Painted Leather Peacock Bag", Item No. #D7724955 have an upside-down heart-shaped image in the center area of the feather. *Id.*

94. Some of the preexisting peacock feather images and Seventh Avenue's "Hand-Painted Leather Peacock Bag", Item No. #D7724955 have a heart-shaped image superimposed over an oval image of a contrasting color, to the upside down heart-shaped image in the center area of the feather. *Id.*

95. Some of the preexisting peacock feather images and Seventh Avenue's "Hand-Painted Leather Peacock Bag", Item #D7724955 have the heart shaped image and the oval image encircled by a roundish form, featuring yellow, green and purplish colors. *Id.*

96. In some respects the stylized peacock feather in Seventh Avenue's "Hand-Painted Leather Peacock Bag", Item No. #D7724955, if taken alone, ignoring the other graphics on the bag, is more similar to the preexisting peacock feather images in Exhibit B than to Peacock Feather #1. Counterclaim Ex. B, Complaint Ex. B. Def Cumul Appx 13, 19 – 20, 130, 132, 136,

Respectfully submitted

May 5, 2017`  
Date

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I hereby certify that I shall, on the 5<sup>TH</sup> day of May, 2017, serve a copy of the foregoing, by filing same with the US Courts ECF system which will send a copy to:

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Dated: May 5, 2017

/David C. Brezina/

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